United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7209

United States Court of Appeals

For the Second Circuit.

B

EMILE A. WILLIAMS,

Plaintiff-Appellant,

-against-

McALLISTER BROTHERS INC.,

Defendant-Appellee.

P/S

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

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IN THE

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Docket No. 75-7209

EMILE A. WILLIAMS,

Plaintiff-Appellant,

-against-

McALLISTER BROTHERS INC.,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

Statement

The plaintiff appeals from the Order of Judge, Charles E. Stewart Jr., entered on February 27, 1975 (129)*; in the

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* Numbers refer to the pages of the APPENDIX. The Order appealed from is based solely on the papers filed below and reproduced in the Appendix. No oral testimony was taken or considered.

United States District Court for the Southern District of New York, granting Defendant's motion dated April 15, 1974 (24) for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing the Complaint.

FACTS

This action was brought by Plaintiff, an American Merchant Seaman against Defendant, McAllister Brothers Inc., for damages for personal injuries sustained on December 6, 1970 while employed as a Cook on board the Tug, BARBARA McALLISTER.

Plaintiff is a Merchant Seaman who has been duly documented as an unlicensed seaman since 1945. He has been sailing on American Flag vessels since 1947, and has been a member of the National Maritime Union since that year. As Plaintiff has stated in his Affidavit (78 to 82), "he has always sailed on American Flag vessels. He has always been hired out of the National Maritime Union halls and understood that his employment as an American Seaman on American Flag vessels entitled him to the protection of the Jones Act."

The circumstances under which Plaintiff became employed on board the BARBARA McALLISTER, was thoroughly consistent with the foregoing insofar as he was hired out of the National Maritime Union hall in San Juan, Puerto Rico. The application for employment (44 to 46) carried

no printed matter on it other than the standard questions and gave no indication that Plaintiff was to be hired by Port San Juan Towing Company rather than McAllister Brothers Inc. Plaintiff believed that he would be afforded all the rights of an American Seaman since the application for employment was printed in the United States of America and clearly referred to the Civil Rights Act of 1964 (44).

It was Plaintiff's understanding from the first time that he was advised at the Union Hall about the job on board the Tug BARBARA McALLISTER, that he would be employed by McAllister Brothers Inc., and by no one else. He has stated that he would never have taken a job where he would not be afforded his rights and protection as an American Seaman under an American Flag vessel (82).

This action was brought pursuant to the Jones Act and General Maritime Law for the negligence on the part of the Defendant, and the unseaworthiness of its vessel, by reason of which Plaintiff sustained a fracture of the Stylord Process of the Left ulna and fracture of the left orbit, resulting in his being not fit for duty for a period of approximately nine months, and a ten percent disability of the left hand.

The aforementioned accident occurred when Plaintiff was caused to fall from a ladder on the Tug. It is indisputed that the Tug BARBARA McALLISTER on which Plaintiff was employed was owned by Defendant. However, Defendant

claims that it had bare boat chartered the Tug to Port San Juan Towing Company, and hence divested itself of responsibility as well as control. It should be noted that the agreement was signed on behalf of Port San Juan Towing Company by Brian McAllister (36).

It is Defendant's contention that Plaintiff was employed by Port San Juan Towing Company which is admittedly a subsidiary of the Defendant, McAllister Brothers Inc. Defendant claims that the laws of Puerto Rico would therefore apply insofar as Plaintiff's accident is concerned and Plaintiff could not sue his employer pursuant to the Jones Act and General Maritime Law, but would rather be relegated to the miniscule relief afforded him by the Puerto Rico Workmen's Accident Compensation Statute.

Defendant moved the Lower Court (24) pursuant to Rule 56 of the Federal Rules of Civil Procedure for an Order dismissing the Complaint on the grounds that:

(a) Defendant was not the employer of of the Plaintiff.

(b) Defendant had bare boat chartered the Tug to Plaintiff's employer prior to the accident.

(c) The Workmen's Accident Compensation Statute of Puerto Rico is a bar to this action.

The Defendant's motion having been granted, it is

respectfully submitted that Judge Stewart's holding dismissing the Complaint is contrary to the Law, and contrary to all of the facts contained in the papers filed below.

QUESTIONS INVOLVED

1. Whether Port San Juan Towing Company is a mere instrumentality controlled by its parent corporation, McAllister Brothers Inc., which is, therefore, liable to Plaintiff?
2. Whether the Lower Court, having found that the "two companies are one entity" erred in finding that Plaintiff's sole remedy was the Puerto Rico Workmen's Accident Compensation Statute insofar as Port San Juan Towing Company was insured thereunder while McAllister Brothers Inc., the parent and controlling corporation was not?
3. Whether the Lower Court erred in applying the Law of the wrong forum inasmuch as Plaintiff, an American seaman injured on a vessel owned and controlled by a United States Corporation, which vessel has substantial contacts with the United States is entitled to recover under the Jones Act?

4. Whether the Lower Court erred in precluding Plaintiff from proceeding as against Mc Allister Brothers Inc., the owner of the vessel under the Jones Act and General Maritime Law?

5. Whether the Lower Court erred in granting Summary Judgment as there were genuine issues of material fact presented?

POINT I

PORT SAN JUAN TOWING COMPANY IS A MERE INSTRUMENTALITY CONTROLLED BY ITS PARENT CORPORATION, McALLISTER BROTHERS INC., WHICH IS THEREFORE LIABLE TO PLAINTIFF.

Fan Fan v. Berwind Corp., 362 F. Supp 793 (ED. Pa., 1973) held that the parent corporation of a corporate employer insured under the Puerto Rican Workmen's Accident Compensation Act could not be held liable for the Jones Act negligence and unseaworthiness of a tug owned and operated by the employer which allegedly caused injury to the seaman within the territorial waters of Puerto Rico in the absence of a showing that the employer was a mere instrumentality of the parent corporation. It is clear that the Court implied that if it can be shown that the employer is a mere instrumentality of the parent corporation, then an injured seaman would not be barred from bringing an action under the Jones

Act and General Maritime Law against the parent Corporation.

There is no dispute that Port San Juan Towing Company is a subsidiary of defendant. It is admitted that the stock of Port San Juan Towing Company is wholly owned by Defendant and that its officers and directors with the exception of those persons responsible for the ministerial activities of Port San Juan Towing Company, are all Mc-Allisters. Defendant acknowledges the well settled rule that corporate entity will be disregarded and the parent held liable for its subsidiary when the subsidiary's affairs are so controlled as to render it an instrument or agent of its parent. Berger v. Columbia Broadcasting System Inc., 453 F 2d 991 (5th Cir. 1972).

The Salient point to be considered in applying this rule is the facts of each particular case. The applicability of the rule will of course vary with the facts of each case. In the Berger case, it was stated that if the parent corporation completely dominates not only the finances but the policy and business practices of its wholly owned subsidiary corporation, the subsidiary corporation will be considered a mere instrumentality of its parent, and the Court will pierce the corporate veil.

Plaintiff respectfully refers this Court to the deposition dated October 24, 1972 of George W. Farrell Jr., (92 to 109) and the supplementary statement dated April 15 1974 (110). Mr. Farrell was deposed by Plaintiff's attorney

in response to a Notice dated September 26, 1972 (23). In his deposition, Mr. Farrell responds that 100% of the stock of Port San Juan Towing Company is owned by McAllister Brothers Inc.

In response to the question as to who are the officers of Port San Juan Towing Company, Mr. Farrell answers (97 to 98):

Gerard M. McAllister,	President, Secretary and Director.
Anthony J. McAllister	Vice President and Director.
James P. McAllister	Vice President and Director.
Broderick H. McAllister	Director.
Brian A. McAllister	Executive Vice President.
William Coleman	Vice President and General Manager.
George W. Farrell	Treasurer.
Pedro Trias	Assistant Director.

It is overwhelmingly apparent that McAllister Brothers Inc., not only fills all of the key offices with "McALLISTERS", but likewise predominates the Board of Directors. The deposition of George Farrell Jr., clearly sets fortn sufficient facts to show that McALLISTER BROTHERS INC., does indeed dominate the financial policy and business practices of Port San Juan Towing Company

In his deposition, Mr. Farrell is asked (102 to 103) "is it correct to say that Port San Juan Towing Company is

a subsidiary of McALLISTER BROTHERS INC., is wholly controlled by McALLISTER BROTHERS BROTHERS?, and replies "When you say 'wholly controlled', wholly controlled within the framework of McAllister's objectives..."

Mr. Farrell clearly refers to the fact that Port San Juan Towing Company must look to McAllister Brothers Inc., for its vessels (105). It is clear from Mr. Farrell's deposition that control over Port San Juan Towing Company is clearly vested in McALLISTER BROTHERS INC., with the exception of the day to day ministerial acts concerning the vessels such as repairs and manning.

The key with regard to control of Port San Juan Towing Company by McALLISTER BROTHERS INC., is again clearly stated in the deposition of Mr. Farrell (108):

> Q. You testified that Mr. Coleman made all the day-to-day decisions insofar as running Port San Juan was concerned, but is it correct to state that if there was a major decision, that he would have to consult with McAllister?
>
> MR. McALLISTER: Can I object to the form. Can you give me an example?
>
> Q. Well, for chartering a few tugs or doing something that required an extreme expenditure of money, something that didn't come up in the everyday course of business is it true that he would have to consult with somebody from McAllister?
>
> A. Well, he has to work within the framework and the policy of McAllister. He would have to adhere to the policy of McAllister Brothers. If he stays within the framework, the guidelines, if you will, set forth by McAllister, he then can do any day-to-day operating decisions as fits the needs of the business.

Plaintiff also respectfully refers this Court to the fact that the affidavits for both MCALLISTER BROTHERS INC., and Port San Juan Towing Company submitted with Defendant's moving papers (31 to 33) (38 to 40) were made by one William J. Coleman by virtue of the fact that he was in a position to act for both companies. This would indicate that he as well as Port San Juan Towing Company is under the obvious control of McALLISTER BROTHERS INC. Likewise, the same affidavit acknowledges that "all decisions concerning routine maintenance and repairs are made by Port San Juan Towing Company. Major repairs, of course, may require the knowledge and concurrence of the owners of the vessel." Surely this indicates the high degree of control that defendant maintains over the vessels despite the fact that it claims it has divested itself of such control by bare boat chartering.

A copy of a letter dated July 16, 1971 (113) indicates that Port San Juan Towing Company is a subsidiary of McALLISTER BROTHERS INC. It should be noted that this letterhead carries the address of 17 Battery Place, New York, New York 1004, and carries the telephone number as listed in the Manhattan Telephone Directory, of McALLISTER BROTHERS INC., for Port San Juan Towing Company.

Steven v. Roscoe Turner Aeronautical Corporation, 324 F 2d 157 (1963), discusses the factors that are relevant in determining the requisite degree of control for a subsidiary to be considered a mere instrumentality. Factors generally considered are as follows:

> "(a) The parent corporation owns all or most of the capital stock of the subsidiary.

(b) The parent and subsidiary corporations have common directors or officers.

(c) The parent corporation finances the subsidiary.

(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

(e) The subsidiary has grossly inadequate capital.

(f) The parent corporation pays the salaries and other expenses or losses of the subsididary.

(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation or its business or financial responsibility is referred to as the parent corporation's own.

(i) The parent corporation uses the property of the subsidiary as its own.

(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

(k) The formal legal requirements of the subsidiary are not observed."

The facts in the instant case clearly come within eight (8) of the eleven (11) criteria listed, to wit, a, b, c, d, g, h, i, and j.

The Steven case reiterates the well settled rule that in order to establish that a subsidiary is the mere instrumentality of its parent, three (3) elements are to

be proved:

> "Control by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary, e.g., torts, violation of a statute or stripping the subsidiary of its assets; and unjust loss or injury to the claimant, such as insolvency of the subsidiary." (P. 160)

It is submitted that all of the aforementioned elements are present in the instant case. Facts indicating the requisites of control have clearly been demonstrated. The fraud or wrong lies in the deliberate attempt of Defendant to circumvent applicable Jones Act liability. Unjust loss or injury to Plaintiff is evident in the fact that he has been disabled for approximately nine months, has a suggested ten percent disability and has received only a mere $1,620.00 representing the maintenance and cure to which he was entitled under the General Maritime Law.

In Fisser v. International Bank, 2 Cir., 282 F 2d 231 (1960), it is repeated that to apply the instrumentality rule the parent must have control over the subsidiary, and it must be used by the parent to "perpetrate violation of a statutory or other positive legal duty" such as is clearly present on the facts of the instant case.

For a corporation to be held liable for torts of a subsidiary, it must appear that the subsidiary was operated as a mere instrumentality of the parent. Neither ownership of all of the stock of a subsidiary, nor identity

of officers and directors nor both combined are sufficient to justify piercing the corporate veil. While stock, control, and common directors and officers are generally prerequisites for the application of the instrumentality rule, yet they are not sufficient by themselves to bring the rule into operation...Such facts are common business practices and exist in most parent and subsidiary relationships. The additional factors which must be present have been variously described as direct intervention in the subsidiary's affairs, the act of operation of the subsidiary's business, or the exercise of control, not the opportunity to exercise control. American Trading and Production Corp., v. Fishbach & Moore Inc., 311 F. Supp. 412 (N.D. Ill., 1970). Clearly the Farrell deposition and the Coleman affidavits demonstrate the presence of these elements.

In Brown v. Margrande Compania Naviera, S.A. 281 F. Supp. 1004 (1968), the facts evidenced sufficient stock ownership but only potential control by the parent over the subsidiary which the Court held not to be enough to impute liability to the parent. However, the Court held that there would be a different result if there was evidence of:

> "injustice, or fraud, or that public convenience is affected, or that any illicit act has been committed." (P. 1007)

The Brown case would appear to give alternatives to the elements set forth in the Steven case.

In In re. Ira Haupt & Co., 289 F. Supp. 966 (S.D.N.Y) (1968), the Court brought into play the principles of equity and injustice. It stated that the corporate veil is pierced to permit assertion against the parent of liability incurred by its dominated subsidiary, as in the instant case, when the parent has taken over management and direction of the subsidiary's affairs. The Court carefully examined the facts of the case and went on to state:

> "In consonance with equitable principals the status of a subsidiary corporation as a separate entity should be disregarded when that is required to avoid fraud and injustice". (P.971)

Whether one corporation is the principal for another or is the dominant corporation of the two, so that one corporation may be said to be the alter ego of another is a factual matter. Haynes v. Champagne Tile Corp., 288 157 F. Supp. (E.D. la. 1964). National Bond Finance Co., v. General Motors Corp., 341 F. 2d 1022 (8th Cir., 1965). Under New York Law whether two corporations are but one, is a question of fact dependent upon the actual relationship between the two, and not upon legal technicalities. Sylvia Martin Foundations v. Swearinger, 260 F. Supp. 231, (S.D.N.Y., 1966).

It is submitted that defendant has failed to "demonstrate the lack of domination", but rather that

plaintiff has in fact demonstrated such domination by defendant over Port San Juan Towing Company. In any event, a genuine issue of material fact has been presented, to wit, whether Port San Juan Towing Company is a mere instrumentality of McALLISTER BROTHERS INC., which precluded the Court below from disposing of this matter on a motion for Summary Judgment.

POINT II

THE LOWER COURT, HAVING FOUND THAT "THE TWO COMPANIES ARE ONE ENTITY", ERRED IN FINDING THAT PLAINTIFF'S SOLE REMEDY WAS THE PUERTO RICO WORKMEN'S ACCIDENT COMPENSATION STATUTE INSOFAR AS PORT SAN JUAN TOWING COMPANY WAS INSURED THEREUNDER WHILE McALLISTER BROTHERS INC., THE PARENT AND CONTROLLING CORPORATION WAS NOT.

Judge Stewart in the Court below, stated that even if the two companies were found to be one entity, Plaintiff's suit would still be dismissed as his exclusive remedy against his employer was the Puerto Rico Workmen's Accident Compensation Statute (127).

It is submitted that if the instrumentality rule is invoked and McALLISTER BROTHERS INC., is held liable for the torts of its subsidiary, Plaintiff's suit against McALLISTER BROTHERS INC., would not be barred by the Puerto Rico Workmen's Accident Compensation Statute as only Port

San Juan Towing Company was insured thereunder and not the Defendant, McALLISTER BROTHERS INC.

POINT III

THE LOWER COURT ERRED IN APPLYING THE LAW OF THE WRONG FORUM INASMUCH AS PLAINTIFF, AN AMERICAN SEAMAN, INJURED ON A VESSEL OWNED AND CONTROLLED BY A UNITED STATES CORPORATION, WHICH VESSEL HAS SUBSTANTIAL CONTACTS WITH THE UNITED STATES, IS ENTITLED TO RECOVER UNDER THE JONES ACT.

A discussion of the applicability in the instant case must necessarily begin with reference to Lauritzen v. Larsen, 345 U.S. 571, 1953 A.M.C. 1210 (1953). The Supreme Court set out a seven (7) factor approach and discussed the significance of each. The factors are:

(1) The place of the wrongful act.

(2) The law of the flag.

(3) The allegiance or domicile of the injured party.

(4) The allegiance of the defendant shipowner.

(5) The place of the contract.

(6) The inaccessibility of the foreign forum.

(7) The law of the forum.

The first factor, the place of the wrongful act is given little weight in Lauritzen as well as the fifth factor

the place of the contract; nor are the sixth and seventh factors considered of particular importance. Rather the Court takes special cognizance of the Law of the Flag and the allegiance of the shipowner. The Court stated on Page 587:

> "It is common knowledge that in recent years a practice has grown, particularly among American shipping owners, to avoid stringent shipping laws by seeking foreign registry. Confronted with such operations, our Courts on occasion, have pressed beyond the formalities of more or less nominal foreign registry to enforce against American shipowners the obligations which our law places upon them."

In determining the proper choice of law to be applied in an action by a seaman for injuries, if the law of the flag is to control, the flag must not be one of convenience, but must be bona fide, Southern Cross Steamship Co., v. Firipis 285 F. 2d 651 (4th Cir., 1960).

In Bobalkis v. Compania Panamena Maritimea, 168 F. Supp. 236, 1959 A.M.C. 697 (S.D.N.Y.), the Court in considering the applicability of the Jones Act in a case involving a Greek citizen with an accident in Canadian waters on a vessel registered in Panama owned by a Panamanian corporation of which the majority of stock owned by residents and citizens of New York, the Court discussed the language and applicability of the Lauritzen case and stated on page 699:

> "...an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns. I do not believe that the law can be so easily baffled... For the purposes with which we are concerned, such corporate intervention is but a weak fortress".

Indeed, shortly after the Supreme Court's decision in Lauritzen, the ineffectiveness of foreign corporations as a shield against the Jones Act, liability was established by this Court in Zielinski v. Empresa Hondurena de Vapores, 1953 A.M.C. 1854, 113 F. Supp. 93 (S.D.N.Y.). There the Court found the Jones Act jurisdiction proper where all of the stock of a corporate owner of a foreign flag vessel was owned by an American corporation which had also chartered the ship, and the plaintiff was a Polish citizen domiciled in the United States.

The Court held that majority ownership and control by Americans of the corporate owner of the vessel represents sufficient contact with the United States to justify the application of the Jones Act. In the instant case, we most assuredly have majority ownership and control by Americans of the corporate owners of the BARBARA McALLISTER, plus the American citizenship and domicile of plaintiff. In addition, the contact of the vessel with American ports as well as its American documentation and financing are to be considered.

A copy of the Certificate of Ownership (114) of the vessel BARBARA McALLISTER from the United States Coast Guard shows the owner of this tug to be McALLISTER BROTHERS INC., a corporation organized and existing under and by virtue of the laws of the State of New York, of 17 Battery Place, New York, New York. It further notes the mortgagee of the vessel to be the Marine Midland Bank of New York.

The temporary Certificate of Registry (115), is stamped "75% of the interest in the corporation owning this vessel is owned by citizens of the United States. It may engage in the coastwise trade so long as so owned and no longer. This is significant in that it indicates that the stock ownership in excess of 75% entitles the vessel to carry domestic cargo to domestic ports pursuant to the Applicable Coast Guard Documentation and would indicate that the BARBARA McALLISTER has substantial contacts with the United States.

The Court is respectfully referred to portions of the depositions of Mr. Victor Manuel Martinez, and Mr. Antonio Obergon which were taken in an action entitled Victor Manuel Martinez v. McAllister Brothers Inc., bearing Index Number 72 Civ. 3196 in this Court. Mr. Martinez had been injured while employed on board the Tug NEIL McALLISTER in December of 1971. The Defendant likewise alleged that the Puerto Rico Workmen's Accident Compensation Statute would apply rather than the Jones Act; and further alleged that

Mr. Martinez had been employed by Port San Juan Towing Company. On page 2 (120) of Mr. Obergon's deposition, when questioned as to his employer, Mr. Obergon who is Chief Engineer on the Tug Neil McAllister, stated it to be McAllister Brothers Inc. Likewise, his testimony on page 35 (121) refers to the trips the tug Neil McAllister made to St. Thomas, St. Crox, South America, Miami and Jacksonville surely indicating sufficient contacts in the United States. There has been no testimony on the contacts of the BARBARA McALLISTER in the United States with other ports simply because discovery proceedings have not been had.

In Hellenic Lines Limited, et. al. v. Rhoditis, 398 U.S. 306, 1970 A.M.C. 994 (1970), the Lauritzen factors were considered in determining whether a particular owner should be held to be an "employer" for Jones Act purposes. In the Rhoditis case, the vessel was owned by a Panamanian corporation which in turn was owned by a Greek corporation of which ninety-five (95) percent of the stock was owned by two United States residents. The Lower Court held the Jones Act to apply referring to the substantial contacts and the fact that the operation was clearly managed, controlled and operated from the United States. The Supreme Court of the United States affirmed stating on page 997:

> "If, as stated in Bartholomew v. Universe Tankships Inc., 1959 A.M.C. 273, 263 F 2nd 437, 2nd Cir. (1959), the liberal purposes of the Jones Act are to be effectuated

> the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States. By that test the Court of Appeals was clearly right in holding that petitioner was an 'employer' under the Jones Act.

It is interesting to note the holding in the Lower Court Hellenic Lines Limited et. al. v. Rhoditis, wherein the Court stated on page 1308:

> "Courts need not elevate symbols over reality. We therefore pierce the corporate veil and conclude that the Heros flag is merely one of convenience".

In the Bartholomew case supra, the Court held that in each particular case there must be something between minimal and preponderant contacts if the Jones Act is to be applied the test being that "substantial" contacts are requisite. The Court went on to state that while one contact such as the fact that a vessel flies an American Flag may alone be sufficient, this is no more than to say that in such a case the contact is so obviously substantial as to render unnecessarily any further probing into the facts. It was clearly noted by the Court that the seven "Talisman" of the Lauritzen case are neither exclusive nor immutable.

In the Bartholomew case the Court of Appeals for the second Circuit affirmed the District Court in holding

that the plaintiff had a right to invoke the Jones Act against his employer, a Liberian Corporation. Due consideration was of course given to Lauritzen. The Court in affirming stated at page 280:

> "Although appellant contends otherwise the practice in this type of case of looking through the facade of foreign registration and incorporation to the American ownership behind it is now well established. Gerradin v. United Fruit Co., (2 Cir., 1932, 1933 A.M.C. 81, 60 F. (2d) 927, cert. denied, 287 U.S. 642; Carroll v. United States (2 Cir.), 1943 A.M.C. 339, 133 F. (2d) 690; Zielinski v. Empresa Hondurena de Vapores, (S.D.N.Y.), 1953 A.M.C. 1854 113 F. Supp. 93; Torgersen v. Hutton (2d Dep't., 1934), 1935 A.M.C. 195, 243 App. Div. 31, 276 N.Y. Supp. 348 affirmed (1935), 267 N.Y. 535, 196 N.E. 566, cert. denied (1935), 296 U.S. 602, 1935 A.M.C. 1442. This is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating flag. See Lauritzen, 345 U.S. at p. 587, 1953 A.M.C. at p. 1227. In the case now before us, appellant has taken the trouble to insert an additional nominal foreign corporation between the flag and the true beneficial ownership of the vessel. But we have little difficulty in brushing all this aside when considering the applicability vel non of the Jones Act. Complicating the mechanics of evasive schemes cannot serve to make them more effective. What we now do is not to disregard the corporate entity to impose liability on the stockholders, but rather to consider a foreign corporation as if it were an American corporation pursuant to the liberal policies of a regulatory act."

Likewise in Pandazopoulos v. Universal Cruise Line, 1973 A.M.C. 2433, 365 F. Supp. 208 1973, (S.D.N.Y.). The Court referring to Lauritzen and citing the Rhoditis and Bartholomew cases, the ownership of defendants as well as its officers and directors were all seated in the United States and more particularly New York, as in the instant case, The Court concluded that:

> "The foreign incorporation of these defendants and the foreign registration of the vessel are a facade designed to disguise American beneficial ownership, operation and control and to avoid the consequences of the American shipping laws. The beneficial ownership of the defendants by American interests and the location of the defendants' base of operations in New York are substantial contacts with the United States and are the 'heavy counterweight' necessary to overcome the law of the flag which is, on the facts of this case, a mere flag of convenience. The teachings of Lauritzen, Bartholomew and the cases subsequently decided clearly require this Court to hold that the Jones Act is applicable to the claim asserted by the plaintiff and that the plaintiff is, therefore, entitled to proceed to a jury trial, pursuant to the terms of that statute."

In Pandazopoulous v. Universal Cruise Lines, Inc., 365 Supp. 208, (S.D.N.Y., 1973), plaintiff was a Greek national residing in Greece. He was hired in Greece as a member of the crew of the SS CARIBA, the vessel upon which his injuries were sustained. The SS CARIBA was registered in Panama and flys that nation's flag. At all times it was owned by defendant Universal Lines and operated by defendant

Universal Cruise Lines, both Panamanian corporations. Plaintiff signed standard form Panamanian articles while the vessel was in Italy. He executed an agreement which made reference to employment under the terms of the Greek Collective Bargaining Agreement with regard to working conditions and wages. Plaintiff was injured on the high seas, five hours from St. Thomas, Virgin Islands. The Court found:

> "On its face, Universal Lines is a Panamanian Corporation. In reality the entire beneficial ownership of Universal Lines is in the hands of two American Corporations. Similarly 50% beneficial ownership of Universal Cruise Lines is American. At the time of plaintiff's accident, all directors and officers of Universal Lines were citizens of the United States and residents of New York. The same was true of Universal Cruise Lines, except for its President, who was a Turkish citizen."

As was stated by Judge Medina in the Bartholomew case,

> "The practice of looking through the facade of foreign registration and incorporation to the American ownership behind it is now established. This is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag. Appellant has taken the trouble to insert an additional nominal foreign corporation between the flag and the true beneficial ownership of the vessel. But we have little difficulty in brushing all this aside when considering the applicable vel non of the Jones Act. Complicating the mechanics of evasive schemes, cannot serve to make them more effective. What we do now is

> not to disregard the corporation entity to impose liability on the stockholders, but rather to consider a foreign corporation as if it were an American Corporation pursuant to liberal policies of a regulatory act.

The Lauritzen criteria of the Jones Act jurisdiction was recently considered by this Circuit in Manocada v. Lemuria Shipping Corp. Even though a majority of the Lauritzen factors favored the defendant shipowner, The Court held the Jones Act to apply where all of the shipowners officers and stockholders were Americans, the managing and chartering were conducted from the United States, and some forty (40) percent of the voyages began and ended in American Ports. 1974 A.M.C. 40.

It is respectfully submitted that consideration and application of the factors set forth in the Lauritzen case and reiterated in the cases hereinabove mentioned as applied to the facts in the case at hand clearly bring plaintiff within the purview of the Jones Act and entitle him to its protection.

POINT IV

THE LOWER COURT ERRED IN PRECLUDING THE PLAINTIFF FROM PROCEEDING AS AGAINST THE DEFENDANT UNDER THE JONES ACT AND GENERAL MARITIME LAW.

In the event that one were to consider McAllister Brothers Inc., and Port San Juan Towing Company as separate corporate entities, plaintiff would still have a right to sue and recover against defendant as a third-party under

the Jones Act and General Maritime Law.

§32 of the Puerto Rico Workmen's Accident Compensation Act provides in part,

> In cases where the injury, the professional disease, or the death entitling the workman or employee or their beneficiaries to compensation in accordance with this chapter has been caused under circumstances making a third-party responsible for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third-party responsible for said injury, disease, or death, within one year following the date of the final decision of the case by the Manager of the State Insurance Fund, who may subrogate himself in the rights of the workman or employee or his beneficiaries to institute the same action in the manner following:
>
> ...If the Manager should fail to institute action against the third person responsible as provided in the preceding paragraph, the workman or employee or his beneficiaries shall be fully at liberty to institute such action in their behalf, without being obliged to reimburse the State Insurance Fund for the expenses incurred in the case.

A workman or employee of an insured employer who while in the course of his employment suffers an injury on account or the fault or negligence of a third person, has two remedies: 1. To sue the latter for damages, and 2. To resort to the benefits of the Workmen's Compensation Act providing for compensation from the State of New York Insurance Fund. Under Puerto Rican Law, the fact that the persons injured in the accident has received compensation under the Workmen's Compensation Act, does not prevent him from bringing an action for damages against a third-party

responsible for the injuries, Santiago v. Hermanos 255 F. Supp. 932, (Puerto Rico, 1966).

The Workmen's Compensation Act of Puerto Rico recognizes the right of an action against third parties responsible for employees injuries. 11 L.P.R.A. §1 et seq., 31-32 Guerrido v. Alcoa Steamship Co., 234 F. 2d 349 (1st Cir., 1956).

Even in the Fonseca v. Prann 282, F. 2nd 153 (1960) case, upon which defendant so heavily relies, holds on page 156:

> "It is certainly true that neither the Jones Act nor the General Maritime Law of unseaworthiness are inherently inapplicable in Puerto Rico."

This case delt with an entirely different fact pattern than the instant case. The plaintiffs' having been employed on stationary dredges, one of which was engaged in a highway construction project; recovery was restricted to the local Workmen's Compensation Act. In Alcoa S.S. v. Perez 376 F 2nd 35 (1967), the Court referring to Lastra v. New York and P.R.S.S. Co., 2 F 2d 812 (1924). In referring to the Puerto Rican Statute stating:

> "Section 31 of that Act recognized the right to an action against a third-party based on other existing law; we held that in an action by the longshoremen against the vessel owner who was not his employer, the local law was not inconsistent with the Federal Maritime Law. We conclude therefore, that the longshoremen could maintain an action under the Federal Maritime

Law against the third party shipowner based upon the unseaworthiness of the vessel".

The Perez case was referred to and distinguished in Alcoa S.S. Co. v. Velez, 376 F 2nd 521 (1967). In that case the question was whether the Puerto Rico Workmen's Compensation Act was applicable to seamen who have been employed in the continental United States and who were working temporarily in the navigable territorial waters of Puerto Rico as crew members of vessels owned by corporations incorporated in the United States. The Court, in distinguishing from the Fonseca case stated that in Fonseca there was no occasion to deal with seamen who had been employed outside the jurisdiction of Puerto Rico to working on vessels owned by non-resident employers. The Court, citing Guerrodo & Waterman S.S. Corp. v. Rodriguez, 290 F 2nd 175 (1961), held that the Puerto Rico Workmen's Compensation Act could not supplant a general rule of Maritime Law which Congress in the exercise of its constitutional power had expressly made applicable to Puerto Rican waters in common with all other American waters. The Court went on to consider the Lauritzen case and concluded that the Puerto Rican Workmen's Compensation Act cannot be applied to seamen injured in Puerto Rican waters on an American vessel owned by a corporation of a State other than Puerto Rico. Such seamens' rights under the Jones Act and General Maritime Law of unseaworthiness and maintenance and cure attach upon their employment and follow them into Puerto

Rican waters. The right to sue a third party was reaffirmed in the Guerrodo case where a longshoreman employed by a Stevedore and Company sued the shipowner. The Court held:

> "The broad proposition that the Admiralty and Maritime Law of the United States is not in force to any extent in the navigable waters of Puerto Rico which we laid down in the Lastra case cannot be sustained." (P. 352)

After a lengthy review of the history of the Act and a recitation of Section 31 relating to suits by injured workmen against parties other than their employers allege to be responsible for their injuries, it was significantly observed by the Court on P. 358:

> "...the Statute recognizes the right to an action against third parties responsible for an employee's injuries".

See also Colon Nunez v. Horn Linie, 423 F 2nd 952 (1970), where it was likewise held that a longshoreman employed by an independent insured Stevedoring contractor may sue the shipowner for negligence or unseaworthiness.

Even when the vessel is under a demise or bareboat charter, the vessel owner warrants seaworthiness. He is liable to a person injured while doing seaman's work if the injury was caused by an unseaworthy condition present when the charter was made. Solet v. M/V Capt. H.V. Dufrene 303 F. Supp. 980 (E.D., La. 1969).

The owner always has the burden of proving that the ship is seaworthy when delivered. Grillea v. The United

States, 229 F. 2d 687 (2nd Cir., 1956). Petition of Shavers Transportation Co., 287 F. Supp 339 (Ore.).

Thus, if it were to be determined that defendant could be held responsible for the unseaworthiness of the BARBARA McALLISTER and that he had been at the time employed by Port San Juan Towing Company, defendant would fall into the catagory of the third party shipowner, and in accordance with the cases hereinabove cited, subject to the instant suit of the third party. It is particularly significant that there were no facts submitted by the many affidavits with regard to the accident itself and condition of the vessel.

POINT V

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE WERE GENUINE ISSUES OF FACT PRESENTED.

Defendant has set forth the defense that it has bare boat chartered the BARBARA McALLISTER to plaintiff's alleged employer prior to the date of the accident and hence is not liable for plaintiff's injuries. A similar fact pattern as in the instant case was considered by this Court in Rodriguez v. Solar Shipping Ltd., et. al., 1959 A.M.C. 2502, 169 F. Supp. 79, (1970). Plaintiff was a foreign seaman who was injured on board a vessel flying a Liberian Flag which was owned by a Liberian Corporation. The majority of the stock of the shipowner was owned by citizens of the United States or domiciliaries of New York. It was operated and controlled by citizens of New York. At the time of the accident, the vessel had been chartered to Saguenay Terminals.

Solar moved to dismiss on the ground that the vessel had been bare boat chartered to Saguenay at the time of the injury. The Court once again looked to Lauritzen v. Larsen and stated unequivocally that this District requires stock ownership plus control. The determination of the Court is well applicable in the instant case.

> "Libellant here alleges not only majority stock ownership by United States citizens, but also alleges operation and control by citizens of New York... The allegations of American ownership and control are subject to proof at trial, of course, and failure to do so would be grounds for dismissal of the Jones Act claim, but at this stage of the action the pleadings allege a good claim, so that part of the motion relating to the Jones Act claim is denied.
>
> The other part of the motion, asking that the entire libel be dismissed on the ground that, by virtue of the chartering of the vessel to another corporation, respondent Solar Shipping Ltd., is not legally liable to libellant, is also denied. Libellant has challenged the power of this Court to render Summary Judgment in Admiralty cases. This Court does not find it necessary to decide that issue, for even assuming that Summary Judgment is permissible in a proper situation, no such relief is justified here. The terms of the charter contract the intention of the parties, the employer-employee relationship, and the conditon of the vessel at the time of the charter all raise triable issues of fact which cannot be settled by such a motion."
> (P. 2504 - Emphasis Ours)

Summary Judgment's are not favored in admiralty proceedings unless all facts are so crystal clear that there remains only the application to legal principles to such facts. North American Smelting Co., v. Moller SS Co., 95

F. Supp. 71 (E.D. Pa. 1950). In admiralty as well as Civil cases, Summary Judgment will be where there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. To be sure, the party opposing the motion is to be given the benefit of all reasonable doubt in determining whether a general issue of fact exists. India Supply Mission v. SS Overseas Joyce 346 F. Supp. 536 (S.D. N.Y. 1965). The plaintiff has a right to a trial where there is the slightest doubts as to the facts. Gottlieb v. Isenman 215 F. 2d 184 (1st Cir. 1954). Where there is even the slightest tract of factual issue, a motion for Summary Judgment should be denied. Doman v. Moe 183 F. Supp. 802 (S.D.N.Y. 1959). The policy of Courts is to avoid trial by affidavits as on motions for Summary Judgment and judgment on the pleadings. Anderson-Friberg v. Justin R. Clary & Sons 98 F. Supp. 75 (S.D.N.Y. 1951).

It is respectfully submitted that there are genuine issues of fact, most particulary concerned with the subject of control of a subsidiary corporation by its parent corporation and the seaworthiness of the tug BARBARA McALLISTER when it was delivered to Port San Juan Towing Company which should not have been disposed of on a motion for Summary Judgment, but rather should have been resolved by means of a trial. The Lower Court erred in granting said motion.

CONCLUSION

THE ORDER OF JUDGE STEWART ENTERED ON FEBRUARY 27, 1975 SHOULD BE REVERSED WITH COSTS AND A TRIAL ON THE ISSUES PRESENTED HEREIN GRANTED.

DATED: August 25, 1975

New York, New York

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of July, 1975 deponent served the within Brief upon Healy + Baillie

attonrye(s) for Cappelli

in this action, at 29 Broadway

NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
27 day of July, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976